Filed 6/30/09 In re V.J. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re V.J., et al., Persons Coming Under the Juvenile Court Law.	2d Civ. No. B212572 (Super. Ct. Nos. J1252077, J1252078, J1257079, J1257080, J1257081, J1252164) (Santa Barbara County)
SANTA BARBARA COUNTY CHILD WELFARE SERVICES, Plaintiff and Respondent, v. F.C., et al., Defendants and Appellants.	

Mother and father appeal an order of the juvenile court terminating parental rights to their six children and finding the children adoptable. (Welf. & Inst. Code, § 366.26.)[1] They contend the juvenile court erred in failing to consider the children's wishes regarding adoption, in finding the parental benefit exception does not apply, and in choosing adoption over guardianship. We affirm.

[1] All statutory references are to the Welfare and Institutions Code unless otherwise stated.

FACTS AND PROCEDURAL HISTORY

On July 18, 2007, respondent Child Welfare Services (CWS) filed juvenile dependency petitions on behalf of five children--three girls, ages 2, 6 and 9;[2] and two boys, ages 1 and 5. The petition alleges that mother and father neglected the children by failing to provide them with medical and dental care--for asthma, scarlet fever, broken bones, severe burns and tooth decay--adequate supervision, and appropriate shelter. In addition, the children had not received immunizations in a timely manner and the two older children had not been to school in six months. CWS had received eight referrals in the prior three years regarding neglect by mother.

Five days prior to filing the petitions, CWS was called to the emergency room of Lompoc Hospital. The children had been left unsupervised in the hospital lobby for more than two hours while mother was seeking headache medication. When CWS arrived at the hospital, the children had been taken away by a relative. When CWS spoke to mother, she said the children were staying with their grandmother. However, the information mother provided was false. CWS was unable to locate the children or mother for several days after the incident as the address that mother had given to CWS was for a vacant house.

Mother and father have extensive criminal histories. Mother was arrested on multiple occasions for grand and petty theft. She also has a substance abuse problem. Father has been arrested and charged with spousal battery on multiple occasions, theft, and obstructing a police officer. Father was arrested and jailed for spousal battery in March 2007. After his release, a restraining order prohibited him from having contact with mother.

The children were detained and placed in foster care. A sixth child, a girl, was born during the pendency of the proceedings in August 2007, and has been in foster care since birth.

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[2] Father is not the natural father of the eldest child. The child's natural father is not a party to these proceedings.

Father said that he lived with his mother, that the children stayed with his mother while he was at work, and the children's mother picked them up for visits and returned them in the evening. Father said he was unaware that the children had not received immunizations and blames mother for the children's failure to attend school.

In its report of August 9, 2007, CWS recommended that the children remain in foster care. On August 20, 2007, father told CWS that he wanted to take custody of the children, that he would comply with CWS's requirements, and that he would divorce mother if doing so would aid in his regaining custody of the children. Father's parole officer informed CWS that father was enrolled in a batterer's treatment class and parenting classes.

At the contested jurisdictional hearing on September 13, 2007, the court adopted the findings and orders recommended by CWS. The court ordered that all contacts with the children were to be supervised by CWS.

On October 2, 2007, father was arrested for armed robbery and violation of probation. At the disposition hearing on November 1, 2007, the court ordered reunification services for both parents, ordered them to comply with their case plans and scheduled a status review hearing.

In a status review report of March 13, 2008, CWS recommended that family reunification services be terminated for both parents. CWS reported that mother was arrested on December 6, 2007, for being under the influence of a controlled substance and disturbing the peace. At the time of her arrest, mother admitted that she used methamphetamine and tested positive for methamphetamine and narcotics. On January 27, 2008, mother was arrested on a bench warrant related to these offenses.

In discussing mother's compliance with her case plan, CWS stated that on December 13, 2007, mother said that she had not made any progress and that she did not have the time or money to participate in the case plan. She also said she had not been referred to a substance abuse program. CWS made a referral the following day. Mother returned a signed copy of the case plan on January 3, 2008, but CWS has not had contact with her after that date. At the time of the report, mother had not provided evidence to

CWS that she was attending a domestic violence program or parenting classes, maintaining a legal source of income, or had a safe and stable residence.

Father had completed an anger management class while in jail, but it did not meet CWS standards. Father had not maintained a stable income, did not have a safe and stable home, and had missed several scheduled visits with the children. CWS had not received evidence that father had participated in a substance abuse program. He had not complied with the conditions of his probation and had not completed a parenting class. The report noted that during the period August through November 2007, both parents had missed numerous supervised visits with the children or shown up late or left early or cancelled a visit at the last minute.

In March 2008, the two boys were placed with the maternal grandmother and the four girls were placed with the maternal grandfather and his wife. The grandparents indicated they wished to adopt the children.

On May 1, 2008, CWS filed an addendum report relating the following information: (1) On March 20, 2008, mother was arrested for being under the influence of a controlled substance and possession of a hypodermic needle and other paraphernalia for a controlled substance. (2) Mother had missed appointments with her probation officer. (3) On March 23, 2008, father contacted CWS stating he was out of jail and wanted to schedule a meeting. (4) Father was given a drug referral on March 28, 2008. (5) On April 1, 2008, father and mother came to CWS without an appointment. Father told a supervisor that he was living with his mother and had a full-time job. Mother stated she was not employed and had no contact information. CWS scheduled an appointment for the following day to meet with a case worker. (6) On April 1, father and mother applied separately for food stamps and general relief benefits. Father told the intake worker that he was not employed. (7) On April 2, neither parent showed up for the appointment with the CWS case worker. Mother also failed to appear for her criminal court hearing or Proposition 36 assessment. (8) On April 8, mother was arrested and was in custody with an unknown release date.

CWS filed a subsequent addendum report stating that father had provided CWS with evidence that he had attended five AA meetings, and was enrolled in a substance abuse program. However, he failed to submit to drug testing on April 8, 17, and 22. He had not yet enrolled in a domestic violence program. In an addendum report dated May 22, 2008, CWS reported that father failed to produce a sample for drug testing on May 1 and 6, but did provide three consecutive negative tests as of May 19, 2008. Father still had not enrolled in a domestic abuse program and had not provided any additional information regarding attendance in a 12-step program. He had attended two parenting classes. Father had not had contact with the children since October 2007, had not inquired about their well-being, and had not requested to visit them. Mother was still in jail at the time of the report.

In an addendum report dated June 5, 2008, CWS stated that father had violated the terms of his probation and was scheduled to appear in court on June 4. Father missed required drug testing on May 20, 22, and 30. Father had not provided any further documentation as to compliance with his case plan. Although he called CWS once to request visitation, he could not be reached at the call back number he left. Mother was still in jail and would be sentenced to additional time due to an altercation with another inmate.

On June 5, 2008, at the contested review hearing, the court terminated reunification services and set a section 366.26 hearing for October 2, 2008. In reaching its decision, the court found that reasonable services had been offered to the parents, neither parent had complied with the case plan, and there was clear and convincing evidence that returning the children to the parents would create a substantial risk or detriment to their well-being. The court ordered separate visitation with the children for mother and father. In spite of the court order, mother and father attend visitations together. The care providers of the daughters stated that father had threatened them.

On October 2, 2008, CWS filed a 366.26 report recommending that parental rights for mother and father be terminated. Father had attended two supervised visits with the children in July and September 2008, but had made unauthorized visits to

his eldest daughter near her school and to his sons at Head Start. CWS stated that the parents' refusal to follow court orders caused anxiety and fear for both the children and the children's caregivers. CWS had no information whether either parent had been attending substance abuse or domestic violence programs since termination of reunification services.

On November 23, 2008, CWS reported that father had submitted documentation that he had attended 19 AA meetings since June 12, 2008, completed parenting classes and had three negative drug tests between April 9, and August 28, 2008. Father had not attended an outpatient drug treatment program. Mother had not provided any documentation that she had complied with any portion of her case plan.

On November 25, 2008, the 366.26 hearing was held. Father testified he had been incarcerated between October 2007 and March 2008, but had visited the children after he was out of jail. He said that his sons often telephoned him, but that he rarely talks to his daughters on the telephone because their foster parents prevent the calls. He admitted that he was not in an outpatient drug program but was taking regular drug tests. He did not comply with the domestic violation program required by his case plan, but had enrolled in a program two days before the hearing. Father denied CWS's reports that he had made unauthorized visits to his children.

Father testified the children would have better lives if they were with him. He believed the children were having trouble in school. He stated that the children's grandparents only wanted the children for financial gain. Father denied that he was ever involved in domestic violence. He also refused to take responsibility for the children not attending school or receiving needed medical treatment, blaming mother for these problems.

Mother testified that she had been released from jail on July 22, 2008, and had been clean and sober for eight and one-half months. She had not visited her children from November 2007 through July 2008. She admitted that she was not participating in a domestic violence program, was not enrolled in any outpatient drug program, and was not being tested for drugs.

The case worker testified that the children's care providers wanted to adopt them. CWS argued that the parents failed to meet their burden of showing that the parental benefit exception applied. The parents had never had unsupervised visits with the children and thus could not be seen as acting in a parental role. In addition, some of the children had spent more than half their lives outside of the parents' care. The children's counsel concurred with CWS that termination of parental rights and adoption was the best plan for the children.

Father's attorney argued that father did not believe he did anything that led to the children's removal or keeping them from his custody. He was in jail only for five months and after that had regular visits with the children. Father was appropriate when he visited the children and the children loved their father. He argued that guardianship would be more appropriate than adoption.

Mother's attorney argued that there was no guarantee that adoption with the current care providers would be accomplished and that the children would likely be split up with little chance of visitation among them.

The court terminated parental rights finding that the parents had not met their burdens of proof. The court said: "The fact that we had some good supervised visits doesn't prove much to me. One can be on their best behavior for an hour. . . . We never completed the case plan so we have the unsupervised visits. [¶] The case plan has not been complied with. Even with the time-outs or jail time, people could have been making determined efforts to comply with the case plan. You didn't do that. You have not completed the programs that were ordered to be completed. [¶] I have a dreadful feeling that if I, or some other judge, returned these children to their parents, in . . . relatively short order, we'd be back in the same position that we were two years ago. [¶] I think it is interesting that the testimony from [mother and father] tended to be evasive, tended to be somewhat mendacious. I was offered excuses not performance. [¶] And I question how well, if we did a guardianship, [father] could get along with the guardians. I don't think that's in the cards. I don't think it would work."

On appeal, father asserts the court failed to consider the children's wishes as to adoption and applied the wrong standard in finding the parental benefit exception did not apply. Mother joins in these contentions and further asserts that the court erred in choosing adoption over legal guardianship.

DISCUSSION

Beneficial Parent Relationship Exception

We review the findings of the juvenile court applying the substantial evidence test. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) This standard does not permit the reviewing court to reweigh the evidence or substitute its judgment for that of the juvenile court. (*Rodney F. v. Karen M.* (1998) 61 Cal.App.4th 233, 241.)

Mother and father assert their parental rights should not have been terminated because the beneficial parent relationship exception applies. Section 366.26, subdivision (c)(1)(B)(i) states that parental rights shall not be terminated if "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

The parent bears the burden of proving the exception. Only in the "extraordinary case" can a parent establish the exception because the permanent plan hearing occurs "after the court has repeatedly found the parent unable to meet the child's needs." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) To meet his or her burden of proof, a parent must show more than frequent and loving contact or pleasant visits. (*In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827.) "Interaction between natural parent and child will always confer some incidental benefit to the child. . . . The relationship arises from day-to-day interaction, companionship and shared experiences." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment from child to parent. (*Ibid.*; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.) The juvenile court may reject a parent's assertion of the exception simply by finding that the relationship maintained during visitation does not benefit the child significantly enough to outweigh the strong preference for adoption. (*In re Jasmine D.*, at p. 1350.)

A parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent, or that the parental relationship may be beneficial to the child only to some degree. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.) The parent must also show that continuation of the parent-child relationship will promote "the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.)

The juvenile court did not err in finding the beneficial parental relationship exception does not apply. The record contains little or no evidence that either mother or father plays a parental role in the lives of the children. Prior to detention, the children were severely neglected. Neither father nor mother completed his or her case plans. It was only after reunification services were terminated that father and mother established a pattern of consistent visitation.[3] During this time, however, mother and father repeatedly refused to comply with CWS's direction that they not visit the children other than in a supervised setting at prearranged times. They persisted in attempting to see their children at their schools, causing distress to the children and their grandparents. Although the record shows that the five younger children enjoyed the visits with their parents[4] and one of the younger children cried when at the end of the visits, the record also shows that the children are happy and doing well in their grandparents' care. They received the medical and dental care that their parents had failed to provide them and have made substantial progress in overcoming the educational deficiencies caused by their parents' failure to take them to school--they have reached grade level since being removed from their parents. In addition, the grandparents make sure that all the two groups of children have frequent contact, ensuring that the sibling bond will be maintained. The parents have not

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[3] Mother asserts CWS prevented the parents from visiting the children and that was instrumental in their failure to comply with their case plans. The argument has been waived by failure to appeal the order terminating reunification services. (*Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798, 811-812.)

[4] The oldest child refused to visit her step-father as she was afraid of him.

met their burden of showing that continuation of the parent-child relationship will promote the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with their grandparents.

Mother argues that the current inability of the parents to provide for their children is not a sufficient legal basis for terminating parental rights. The argument is without merit. At the hearing to terminate parental rights, the court must determine whether the parent has failed, and is likely to continue to fail, to maintain an adequate parental relationship. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 425.)

Consideration of the Children's Wishes

Mother and father assert that the court did not consider the children's wishes before terminating parental rights. Section 366.26, subdivision (h)(1), provides, "At all proceedings under this section, the court shall consider the wishes of the child and shall act in the best interests of the child." This section requires the court to "'consider the child's wishes to the extent ascertainable' prior to entering an order terminating parental rights . . . ." (*In re Leo M.* (1993) 19 Cal.App.4th 1583, 1591.) The expression of the children's wishes "'may take the form of direct formal testimony in court; informal direct communication with the court in chambers, on or off the record; reports prepared for the hearing; letters; telephone calls to the court; or electronic recordings.'" (*Id.* at p. 1591, fn. omitted.)

Mother and father failed to raise the issue in the trial court. Had they done so, the juvenile court could have questioned the children directly or made other appropriate inquiry. Because of their failure to do so, mother and father have waived the issue. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293 [dependency matters are not exempt from the rule requiring a party to raise objection before trial court so error may be corrected]; *In re Erik P.* (2002) 104 Cal.App.4th 395, 403 [parent must raise any relevant exception in the section 366.26 hearing or waive the right to raise the exception on appeal]; *In re Amanda D.* (1997) 55 Cal.App.4th 813, 819-820 ["[Father] raised no issue below that the juvenile court should have obtained the minors' testimony regarding their wishes for a permanent plan. [Citation.] He is precluded from presenting it here"].)

Moreover, the record shows that the court did consider the children's wishes to the extent the children were old enough to express them. (See § 361.5, subd. (g)(1)(E) [it is not necessary to obtain a statement from the child if "the child's age or physical, emotional, or other condition precludes his or her meaningful response"].) The juvenile court's obligation to consider the wishes of the children does not require direct evidence of a child's wishes or of the child's awareness that the proceeding is a termination action. (*In re Leo M.*, *supra*, 19 Cal.App.4th at p. 1592.) Instead, where practicable and consistent with the best interests of the child, the agency should attempt to obtain some evidence of the child's feelings from which the court can then infer the child's wishes. In the absence of evidence to the contrary, we will presume the court has performed its statutory obligation on behalf of the child. (*Id.* at p. 1594.)

According to the reports, all the children were happy in their grandparents' care, and were meeting developmental milestones. The letter the eldest child wrote to the court leaves no doubt what her wishes are: "Living with my grandma & grandpa is very fun. I feel like I'm loved by them. Loved like parents should love their kids. [¶] When I lived with my mom and [dad] we wouldn't have food. We would stay at [dad's] sister's house or a motel. Now I go to school. When I was with my mom and [dad] I wouldn't go to school. [¶] I don't get hit now, like I used to by my mom & [dad]. I hate it when they fought and I would get scared. My mom was always being hurt by [dad]. [¶] My mom would always leave us alone. We would never know when she would come back. . . . [¶] We had houses but they didn't pay rent. We would get kicked out. [¶] She would never take us to the dentist. If we got sick she would only give us a little bit of medicine. A lot of us got sick and had problems. . . . [¶] I hope that this will be done! I hate being a foster child! I hope my mom and [dad] won't come to the school or follow us. If they did I would be scared."

Six-year-old F.C., even though he sometimes cries when his visits with his parents end, stated he did not want to live with his parents because he did not want to be locked in his room.

The two youngest children are too young to express their wishes. CWS reported that the other two children are happy living with their grandparents. None of the children have stated they wish to live with their parents. And, even if one of the children expressed a wish to remain with the parents, the court is obligated to consider the child's best interests and the court need not follow the child's wishes unless the child is over the age of 12. (§ 366.26, subds. (c)(1)(B), (h); *In re Joshua G.* (2005) 129 Cal.App.4th 189, 201.) Thus, even if young children may want to live with their parents, doing so may not be in their best interests and the court may nonetheless terminate parental rights. (*Ibid.)*

The record contains sufficient evidence for the court to reasonably ascertain the children's wishes. Even assuming there was error, there is no showing that reversal is warranted. We have been presented with no persuasive argument that the error resulted in a miscarriage of justice so that it is reasonably probable a different result would have occurred in the absence of the purported error. (*In re Celine R.* (2003) 31 Cal.4th 45, 59-60.)

Adoption Versus Legal Guardianship

Mother and father assert that the court should have chosen legal guardianship rather than adoption so that they could maintain contact with their children. The argument is without merit.

Adoption is the preferred permanent plan for dependent children. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1416.) "'Only if adoption is not possible, or if there are countervailing circumstances, or if it is not in the child's best interests are other, less permanent plans, such as guardianship or long-term foster care considered.'" (*In re Autumn H., supra,* 27 Cal.App.4th at p. 574.)

The grandparents have indicated that they are willing and able to adopt the children. Despite mother's speculation to the contrary, there is nothing in the record to indicate that the adoptions will not be approved. Moreover, the existence of a prospective adoptive family is not essential to an adoptability finding. (See, e.g., *In re David H.* (1995) 33 Cal.App.4th 368, 378 ["the suitability of a potential adoptive family is irrelevant in a termination of parental rights hearing"].)

Mother asserts that the court erred in focusing on the relationship between the children and their grandparents rather than the relationship between the children and their parents when deciding whether adoption or guardianship was the best plan for the children. The record does not support this assertion. In making its findings, the court's entire focus was on the welfare of the children. In doing so, the court was required to consider the parents' past conduct and whether that conduct was a likely precursor to their future inability to provide for the needs of their children. (*In re Jasmon O.*, *supra*, 8 Cal.4th at p. 425.)

The record contains substantial evidence that the children are adoptable and that adoption will provide them with the stable home life that their parents have been unable to give them. (See, e.g., *In re Zachary G.* (1999) 77 Cal.App.4th 799, 811 ["When the benefits from a stable and permanent home provided by adoption outweigh the benefits from a continued parent/child relationship, the court should order adoption"].)

The order is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

Lee E. Cooper, Judge*

Superior Court County of Santa Barbara

Aida Aslanian, under appointment by the Court of Appeal, for Defendant and Appellant D.C.

Lee Gulliver, under appointment by the Court of Appeal, for Defendant and Appellant F.C.

Dennis A. Marshall, County Counsel, Toni Lorien, Deputy County Counsel, for Plaintiff and Respondent.

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* (Assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)